IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1871

KALLIR, PHILIPS, ROSS, INCORPORATED,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

and

JOSEPHINE McGEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

There was no opinion rendered by the United States Court of Appeals for the Second Circuit in affirming the judgment in favor of the respondents.

Hon. Edward Weinfeld, Judge of the United States District Court for the Southern District of New York, rendered

an opinion on July 31, 1975 which held that the petitioner had violated §704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a)(1970). This decision was reported in EEOC v. Kallir, Philips, Ross, Inc., 401 F.Supp.66 (S.D.N.Y.1975), and appears herein in Appendix "A".

Thereafter, Judge Weinfeld in an opinion dated October 4, 1976 awarded the respondent, Josephine McGee, the plaintiff-intervenor therein, damages arising from the violation of §704(a) of the Act. This decision was reported in EEOC v. Kallir, Philips, Ross, Inc., 420 F.Supp.919 (S.D.N.Y 1976), and appears herein in Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was docketed on June 7, 1977. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction in invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the discharge of an employee based on sound business reasons but also in part based upon the employee's engagement in "protected activities" constitutes retaliatory conduct in violation of §704(a).

2. Whether the court below violated due process by applying inconsistent legal tests to the facts before it.

3. Whether the overzealous application of Title VII, without regard to compelling business necessities, resulted in an unwarranted abrogation of managerial prerogatives.

4. Whether the court's award of a prospective annual salary was an abuse of the discretion provided it by Congress to fashion equitable relief.

5. Whether the award of damages to respondent for the period between the Magistrate's hearing and the date of judg-

ment without any further inquiry as to respondent's employment status violated due process.

STATUTORY PROVISIONS INVOLVED

The case involves the following statutes:

§704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a) (1970):

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

§706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g) (1970):

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was

> refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

Respondent Josephine McGee was an employee of petitioner Kallir, Philips, Ross, Inc. (KPR), a pharmaceutical advertising agency, from 1967 to May of 1973. During this time she rose from an administrative assistant earning $8,000.00 annually to an $18,000.00 senior account executive. Notwithstanding her rapid rise to an executive level position, McGee felt that she was being discriminated against as a result of her sex because a male senior account executive was earning considerably more money. She brought this to the attention of Mr. Kallir, president and principal stockholder of KPR. He told her that the matter would be considered at the upcoming annual salary review meeting

of the executive committee four months hence. However, McGee was impatient, and she filed a discrimination complaint with the New York City Commission on Human Rights, a course which eventually led to this instant action.

During the pendancy of her complaint with the city agency, McGee displayed a marked change of attitude and began to conduct herself in a manner lacking the degree of sensitivity and discretion which KPR demanded of its executive employees. This occurred at a time when KPR found itself for the first time in a competitive situation with another advertising agency for new business from the Upjohn Company, already one of its largest clients accounting for over ten percent of the gross billings. Ironically, the Upjohn account was then in McGee's hands, and the prime responsibility for maintaining it fell upon her shoulders. In February, 1973

McGee and other executives of KPR participated in a "dry run" presentation at Upjohn to unveil their proposed advertising campaign for the latter's new product. As she would later admit at trial, this presentation was "extremely important". Nevertheless, McGee, to the surprise of nearly all in attendance, constantly interfered with unnecessary interruptions and sarcastic criticisms of her superior, Mr. Jay Lilker.

Back at the office, McGee's conduct was no better, and it grew increasingly hostile and disruptive. However, as found by the court below, there had been no change of KPR's attitude or treatment of its disgruntled employee. In fact, she was afforded even greater responsibilities and more challenging duties. The KPR executives were firmly convinced that her erratic behavior was solely an emotional result of her pending charge and that it

would disappear as soon as the matter was resolved. Therefore, no disciplinary action was taken against her.

This permissive and compassionate attitude suddenly collapsed on March 13, 1973, when it was discovered that McGee had involved a key Upjohn employee in her dispute. Specifically, McGee told Phyllis Korzilius of her complaint and asked Korzilius to furnish a job description letter to be used in the pending proceedings. Because Korzilius occupied a key decisional position at Upjohn regarding the choice of advertising agencies, it was believed by KPR's executives that any unfavorable news she received concerning KPR's sensitive, internal problems could easily lead to the loss of the Upjohn account, especially if she was sympathetic to McGee's cause. McGee would later concede at trial that, in light of a senior account executive's primary duty to insure a

harmonious client-agency relationship, it probably was an abuse of her position to convey an internal problem to the client.

KPR then had no alternative but to act as it did — swiftly and unequivocally. It could not risk further interference with the relationship with its client. Therefore, McGee was suspended with pay. Immediately, McGee filed a new complaint charging KPR with retaliatory conduct. Several weeks later, after it was determined that there was no other work for her at the agency, she was discharged.

Eventually the city agency turned the case over to respondent Equal Employment Opportunity Commission (EEOC), which, after passing upon the merits of McGee's claim and determining that there was insufficient evidence to sustain her original charge of sex discrimination, commenced the action below. McGee was thereafter granted leave to intervene. The EEOC contended that KPR

had engaged in retaliatory conduct against McGee in violation of §704(a) of the Act. After a trial on the merits, the district court, sitting without a jury, rendered a verdict against KPR and awarded judgment in favor of McGee. The court specifically categorized KPR's business reasons for McGee's discharge as pretextual and held that her discharge was unjustified. In order to resolve the issue of applicable damages, the court ordered a reference. Months after a lengthy hearing, the original Magistrate died, and a second Magistrate, solely on a basis of the record, ruled as to the amount of damages incurred by McGee. The court then made its own independent assessment, and awarded McGee as back pay an amount which took into account all fringe benefits and annual raises. In lieu of reinstatement, the court also awarded her a prospective annual salary in order to compensate her for the time it felt it would

take her to find a new job. Petitioner thereupon appealed both decisions to the Second Circuit Court of Appeals, which affirmed without opinion.

REASONS FOR GRANTING THE WRIT

1. There is a conflict among the circuits as to what conduct constitutes retaliation under the Act. Some circuits, most notably the First Circuit, have held that so long as there is a sufficiently valid business reason for dismissing the employee, it is of no import that the employer's reasons for such discharge may also have been partially discriminatory or retaliatory in nature. See NLRB v. Fiber International Corp., 439 F.2d 1311 (1st Cir.1971); accord Gillen v. Federal Paper Board Co., 12 FEP Cases 1329 (D.Ct.1975).

Other circuits take the view that when a discriminatory or retaliatory reason for discharging an employee is coupled with a reason based upon a sound business decision,

such discharge shall be deemed violative of Title VII only where the impermissible reason is the dominant cause for the employee's discharge. See, e.g., Famet, Inc. v. NLRB, 490 F.2d 293 (9th Cir.1974).

In holding that there was a violation of the Act in the instant case, the district court relied on a line of decisions construing a similar situation under §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1)(1970), which holds that if a discharge is even partially grounded upon engagement in protected activities, such discharge will be in violation of the employee's rights notwithstanding that there is evidence of other, more legitimate, reasons for the dismissal of the employee. NLRB v. Gladding Keystone Corp., 435 F.2d 129 (2d Cir.1970).

In light of the above, this Court must finally resolve the issue of whether or not the alleged discriminatory or retaliatory

reason for discharging an employee must be the sole reason for such discharge, the partial reason, or the dominant reason before a violation of Title VII shall be found to exist. If this Court should deem that Congress did not intend to make employers liable for dismissals that are only partially based on retaliatory considerations, then it must grant this writ, for otherwise the petitioner's rights under Title VII shall have been severely prejudiced. It is time that the standards to be employed by the circuits with regard to the substantive issues of Title VII actions be unequivocally and clearly enunciated so that both employer and employee may be adequately protected.

2. This writ should also be granted because the district court judge applied inconsistent and different tests to the conduct of the parties in its determination of liability. With regard to petitioner,

the court used a result-oriented test, finding that petitioner's response to McGee's actions was unreasonable, since they had "no discernable effect on the agency's [petitioner's] relationship with Upjohn." 401 F.Supp. at 72. The court refused to consider evidence of KPR's subjective good faith belief at the time the decision to discharge respondent was made that her conduct could jeopardize its business, and instead it focused singularly on the result: the client was not lost. In so doing, the court applied an improper test. Cf. Sek v. Bethlehem Steel Corp., 421 F.Supp. 983, 993 (E.D.Pa.1976).

Conversely, respondent McGee was afforded the opportunity to prove that her actions with respect to the solicitation of the Korzilius letter were "circumspect" and taken in good faith because she then believed that the confidentiality between the two women would be maintained. It com-

pletely ignored the fact that the matter did not remain confidential and numerous Upjohn employees were aware of her discrimination complaint. Had the court looked solely to the result here, as it wrongly had done in judging KPR's actions, it would have had to rule that McGee's actions were unreasonable and beyond the protection of Title VII. Cf. NLRB v. Knuth Brothers, Inc., 537 F.2d 950 (1976).

3. This Court must establish guidelines by which the district courts can balance the oft competing interests of Title VII enforcement and the essential preservation of managerial prerogatives. The lack of such guidance is clearly indicated by the lower court's failure to recognize the volatile nature of the advertising business in particular and the sensitive, discretional role of key executive employees in general. Instead the court applied the same standards used to

measure the conduct of a ministerial employee whose actions, unless drastic, could not precipitate injury to the employer. Failing to find such drastic conduct on the part of respondent McGee, the court held petitioner liable for retaliation, blindly refusing to consider the subtleties and shadings of conduct at the executive level which readily can alter the course of the employer's fortunes.

Moreover, the court below failed to balance the interests of the parties. It stressed McGee's statutory rights to redress the discrimination from which she felt she suffered, but it completely ignored petitioner's common law rights to expect loyalty from its employees and conduct in its best interests. The carte blanche protection which the court afforded McGee abrogates the common law in complete disregard of Congressional intent and must be addressed by this Court. It is

essential that this Court set forth a rule so that "the employer's right to run his business. . . be balanced against the rights of the employee to express his grievances and promote his own welfare." Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222, 233 (1st Cir.1976). This Court has already indicated its awareness of the necessity of avoiding boundless application of Title VII. See Teamsters v. United States, Slip Op. No. 75-635 (U.S. May 31, 1977); United Air Lines, Inc. v. Evans, Slip Op. No. 76-333 (U.S. May 31, 1977). The situation here warrants similar judicial circumscription.

4. The court's award to respondent of a prospective annual salary was an abuse of its discretion and must not be sanctioned. It is well-settled that Title VII relief is equitable in nature; that a discriminatee must be made whole. Albe-

marle Paper Co. v. Moody, 422 U.S.405 (1975).

The award of front pay goes beyond the remedial purposes of Title VII in that it is an award of future damages, and hence is a legal remedy not contemplated by the Act, or, alternatively, such award is so onerous as to be punitive in nature and as such, must not be permitted to stand. See Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F.Supp. 1363 (S.D.N.Y. 1975).

In addition, the relief to be afforded under Title VII "must consider economic realities and the physical and fiscal limitations of the court to properly grant and supervise relief." United States v. Georgia Power Co., 474 F.2d 906, 922 (5th Cir.1973). Inherent in the award of future pay is the impossibility of adequate court supervision. This is parti-

cularly true in the instant case because Judge Weinfeld failed to provide for the contingency that respondent might find employment before the year had elapsed. Such an award sets a dangerous precedent.

5. During the eight month period between the hearing on damages and the date of judgment the court refused to consider the possibility that respondent had become re-employed. Due to several factors, including the untimely death of the Magistrate prior to his rendering a decision on the issue of damages, a good deal of time transpired before the district court finally determined the amount of damages to be awarded. This award included the eight month period of delay and denied petitioner its due process rights since the court refused to allow KPR the opportunity to confront Ms. McGee in order to determine whether her employment status had been altered during this

thirty-two week interim.

6. Finally, McGee's communication with Korzilius violated the principles enunciated in such cases as Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969) which recognize that confidentiality exists and is to be upheld in all complaints before the EEOC.

CONCLUSION

For the foregoing reasons, petitioner Kallir, Philips, Ross, Incorporated, respectfully prays that this petition for certiorari be granted.

Dated: New York, New York
July 26, 1977

Respectfully submitted,

PHILIPS & MUSHKIN, P.C.
Attorneys for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, 74 Civil 3234

-and-

75 Civil 401

JOSEPHINE McGEE,

Plaintiff-Intervenor,

-against-

KALLIR, PHILIPS, ROSS, INCORPORATED, a New York Corporation,

Defendant.

OPINION FINDINGS OF FACT AND CONCLUSIONS OF LAW

- - - - - - - - - - - - - - - - - - - X

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This action, which had its origin in a charge of sex discrimination in the payment of wages, is now narrowed to a charge of retaliatory conduct.

The action was commenced by the Equal Employment Opportunity Commission ("EEOC") against Kallir, Philips, Ross, Inc. ("KPR"), an advertising agency, charging that it suspended and later discharged Josephine McGee in retaliation for her filing a charge of sex discrimination against KPR and for her opposition to KPR's alleged unlawful employment practices in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended.[1] Josephine McGee (plaintiff) was granted leave to

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(1) 42 U.S.C. § 2000e-3(a). The action was instituted pursuant to § 706(f)(1) of the Act, 42 U.S.C. § 2000e-5(f)(1), with jurisdiction grounded on § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3).

intervene.[2]

I

Plaintiff, at the time of her discharge, was employed as a senior account executive by defendant, which numbered among its clients The Upjohn Company, a pharmaceutical house. She first entered defendant's employ in 1967 as an administrative assistant and from time to time was promoted to positions of increased responsibility with commensurate salary increases. In December 1972, she was assigned to the Upjohn account under Jay

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(2) § 706(f)(1), 42 U.S.C. §2000e-5(f)(1). See Fed. R. Civ. P. 24(a)(1). McGee, together with the EEOC, moved for preliminary injunctive relief. Because the central issue presented a question of fact as to the defendant's motivation in discharging McGee, the court concluded it could not grant preliminary relief on the basis of the conflicting affidavits before it and consolidated the hearing on the application for preliminary relief with an advanced trial on the merits, Fed. R. Civ. P. 65(a)(2).

Lilker, a senior vice president of defendant, who was the account supervisor, and John Kallir, president and principal stockholder of KPR, who was the management representative on the account.

Plaintiff, whose annual salary then was $18,000, learned that a male senior account executive was paid $25,000. On December 4th, she requested of Kallir that her salary be brought into parity with that of her male counterpart. Kallir advised plaintiff that the matter would be considered by defendant's executive committee in April 1973, prior to the sixth anniversary of her employment. Dissatisfied with the lack of immediate favorable action, plaintiff filed a charge of sex discrimination with the New York City Commission on Human Rights ("NYCCHR")[3] against KPR based

(3) § 706(c) of the Act, 42 U.S.C. § 2000e-5(c), requires individuals to resort to

upon the salary differential. In connection with its investigation of the charges, NYCCHR requested an objective job description of plaintiff's position which, rightly or wrongly, she felt could not be obtained from the defendant. Plaintiff thereupon obtained from Phyllis Korzilius, the product manager of Upjohn Company who worked with plaintiff, a letter containing the necessary information.

On March 13, 1973, in accordance with NYCCHR procedure,[4] a fact finding conference was held relative to McGee's claim, attended by Commission representatives, plaintiff, Kallir and other representatives of defendant, including its attorney. In

(3 contd) available state or local remedies for at least 60 days before filing a charge with the EEOC.

(4) N.Y. Executive Law § 297(3) (McKinney 1972).

response to Kallir's statement during the course of the conference as to the scope of plaintiff's activities, a Commission supervisor produced the Korzilius letter. The KPR representatives reacted with displeasure, to say the least; that they resented that plaintiff had contacted its client to obtain the letter admits of no dispute. From the time plaintiff first brought up the subject of alleged discrimination in salary on December 4th, followed by the filing of her complaint and up to her suspension, no KPR official expressed any displeasure because of her charge, or indicated that any action would be taken against her. She continued to perform her usual duties.

On March 26th, Kallir, without any discussion, handed plaintiff a letter which informed her that she was suspended from her duties but that her salary would

continue. The stated reason for this action was:

> "The protracted nature of our adjourned hearing before the Human Rights Commission; the course you've chosen to follow by involving various individuals, both on the agency's staff and at Upjohn; and your divisive behavior make it increasingly difficult for us to carry on our normal day-to-day activities and provide our client with the service they [sic] require."

The following day defendant circulated among its employees a memorandum which, among other matters, stated that it had granted a leave of absence at full pay to plaintiff; that while procedures dragged on at the NYCCHR, defendant saw "no reason at first why they should interfere with [plaintiff's] role in the agency. Increasingly, though, [plaintiff] has taken actions which could prove detrimental to our relationship with Upjohn. The agency-client relationship is so sensitive and dependent

on complete mutual trust that we cannot allow it to be undermined through divisiveness or personal rancor. Thus, she left us no choice but to act as we did." Plaintiff perforce accepted the situation. She promptly notified the NYCCHR of her suspension and upon its request signed a new complaint on March 27th, charging the defendant with retaliatory action. On April 23, she filed a similar charge with the EEOC.(5)

Plaintiff was continued on leave of absence with pay until May 15, 1973, when defendant tersely wrote to her: "In view

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(5) On September 24, 1973, EEOC determined that there was reasonable cause to believe that the charge of retaliatory discharge was true; it also determined that there was insufficient evidence to resolve plaintiff's original charge of discriminatory conduct with respect to terms and conditions of employment. Efforts to resolve the controversy by conciliation failed, following which this action was commenced.

of the circumstances, we have decided to discontinue your checks." The "circumstances" were not stated. There had been no communication between plaintiff and defendant from March 26, when she was put on leave, to May 15th, when she was notified she would no longer be paid.

II

The issue, as noted at the outset, is whether the defendant suspended and later discharged plaintiff in retaliation against her for filing sex discrimination charges with the NYCCHR. Thus the merits of plaintiff's charge of sex discrimination are not before the court.(6) Plaintiff contends

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(6) An employee need not establish the validity of his original claim to establish a charge of employer retaliation for having made the original charge or otherwise engaging in conduct protected by § 704(a). Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1959); Bradford v. Sloan Paper Co., 383 F. Supp. (contd)

she was discharged by defendant in retaliation for her having filed the sex discrimination charge and for assisting the NYCCHR in investigating this charge.(7) The defendant denies that it was so motivated and contends that its action was a legitimate response (1) to plaintiff's conduct in involving the agency's client, Upjohn, in her charge by soliciting evidence from its employees, and (2) her disruptive actions at a preliminary presentation by the

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(6 contd) 1157 (N.D. Ala. 1974); Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972).

(7) § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [an employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

agency to Upjohn in early February 1973. The burden of proof is upon the plaintiff to sustain her claim by a fair preponderance of the credible evidence.(8) Upon the entire evidence, including the demeanor of witnesses who testified at the trial, I find that plaintiff has sustained her burden of proof.

III

A

Originally, one of the reasons assigned by defendant in justification for plaintiff's discharge was that she had filed a charge of sex discrimination, and, in one instance, allegedly had urged an employee to file a similar charge. Defendant now concedes that absent disruptive conduct,

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(8) McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Christian v. General Motors Corp., 341 F. Supp. 1207, 1208 (E.D. Mo. 1972), aff'd without opinion, 475 F.2d 1407 (8th Cir. 1973).

of which there was no proof, plaintiff was within her legal rights in informing her co-workers that she had filed a claim of discrimination against defendant and that they had a right to do likewise. The defendant, as to this phase of its defense, now recognizes it "could not . . . base its decision to discipline plaintiff because of this activity."(9) However, despite this belated acknowledgment, the evidence requires a finding that one of the reasons for defendant's conduct was McGee's discussing her charge with other female employees. Section 704(a) of Title VII forbids "discrimination against . . . employees for attempting to protest or correct allegedly discriminatory conditions of employment,"(10) and it necessarily protects

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(9) Defendant's Post Trial Brief p. 21.

(10) McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 (1973).

an employee from retaliation for merely advising fellow employees of their rights under the law. In discharging plaintiff, at least in part because she engaged in these protected activities, defendant violated the statute.

B

The defendant claims that its action was justified based upon plaintiff's conduct concerning the Upjohn account. Here defendant cites two incidents, her conduct (1) in obtaining the letter from Korzilius, Upjohn's product manager, and (2) at the presentation of an advertising program to Upjohn in early February when it is claimed she engaged in disruptive behavior which imperilled retention of that account.

The first claim can be readily disposed of as lacking in substance. The defendant contends that it properly discharged plaintiff because she requested

the assistance of Upjohn employees[11] in obtaining evidence in support of her charge and sought to involve them in her controversy so that Upjohn would apply some pressure on her behalf. The defendant asserts that this was the primary cause for its action. Plaintiff had been requested by the NYCCHR to obtain an objective description of her job. There was nothing wrong or disruptive for plaintiff to request and obtain the letter from Korzilius, the Upjohn representative with whom she worked and who was familiar with her functions. Plaintiff's actions were circumspect; indeed, when plaintiff informed Korzilius that she had

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(11) Other than the request to Korzilius, McGee solicited no other letters from Upjohn employees. The only other occasion when McGee involved an Upjohn employee was when she asked James Penrose if she could use in connection with her charge an unsolicited letter from him complimenting her job performance.

filed charges she asked Korzilius to keep it confidential. While the letter may have been an abrasive factor in the relationship between defendant and plaintiff, the defendant concedes that it has no effect on the client relationship.

Section 704(a) also prohibits employer retaliation because an employee assists or participates in any manner in an investigation under Title VII.[12] Defendant's

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(12) KPR argues that § 704(a) does not apply to its conduct because the statute only protects the activity of individuals connected with "an investigation, proceeding, or hearing under this subchapter. [Title VII]." (emphasis supplied) Claiming that only EEOC investigations are investigations "under this subchapter," it contends that while it was aware of plaintiff's pending charge before the NYCCHR, since it was not notified that she had filed a charge with the EEOC until after it had discharged her on May 15, 1973, it could not have been retaliating against her for assisting in investigations, etc., "under this subchapter." The argument is frivolous. Resort to the NYCCHR (contd)

violent reaction upon the production of the Korzilius letter at the March 13 NYCCHR fact finding conference, followed closely thereafter by its decision to suspend plaintiff, reveal that the solicitation of the letter was so strongly resented that it was a substantial cause of plaintiff's suspension.

Under some circumstances, an employee's conduct in gathering or attempting to gather evidence to support his charge may be so excessive and so deliberately calculated to inflict needless economic hardship on

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(12 contd) was required in this instance by § 706(c) of Title VII. Moreover, the statute provides protection for those who oppose "any practice made an unlawful employment practice by this subchapter" and clearly McGee's filing a complaint with the NYCCHR and cooperating with its investigation is covered by this language. It is not necessary to file a complaint with the EEOC before § 704(a)'s protection from retaliatory conduct becomes applicable. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 (1973).

the employer that the employee loses the protection of section 704(a), just as other legitimate civil rights activities lose the protection of section 704(a) when they progress to the point of deliberate and unlawful conduct against the employer.(13) But this is not such a case. The defendant concedes that the information sought by plaintiff from Korzilius was relevant to her claim and that she had a legitimate purpose in obtaining it. Plaintiff's statutory right to engage in the protected activity of assisting and participating in the investigation of her charge against defendant would be without substance if defendant could justify her discharge based upon her discreet solicitation of a letter setting forth the nature of her work because of its excessive squeamishness about relations

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(13) McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973).

with a client.

Section 704(a) is to be broadly construed to protect the rights of employees under Title VII.(14) The Act contemplates that employees who may feel aggrieved because of alleged discriminatory conduct will initiate and participate in the process to vindicate their rights without fear of reprisal. Since the enforcement of Title VII rights is necessarily dependent on individual complaints, freedom of action by employees presenting grievances to agencies must be protected against the threat of retaliatory conduct by employers who may resent that they are charged with discrimination.(15) Rigid enforcement against

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(14) Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005-07 (5th Cir. 1969); Held v. Mission Pac. R.R., 373 F. Supp. 996, 1004 (S.D. Tex. 1974); cf. NLRB v. Scrivener, 405 U.S. 117 (1972).

(15) Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969).

retaliatory action is required to assure the effectiveness of the Act. Defendant violated the Act when it suspended and discharged plaintiff for her legally protected activity, requested by the NYCCHR, which caused no discernible effect on the agency's relationship with Upjohn. The defendant's claim that retention of good rapport with its client required that plaintiff be taken off the account is belied by the record. The fact is that nothing plaintiff said or did in any way affected the relationship between defendant and Upjohn. In addition to the evidence that plaintiff's conduct had no effect on that relationship, Kallir testified that Upjohn's product manager told him several times he was sorry plaintiff had been taken off the account.

Thus the issue narrows down to defendant's second claim that it suspended plaintiff because of her conduct in early February

1973 at a preliminary presentation of a proposed advertising campaign to Upjohn when she allegedly interrupted her superior and was otherwise disruptive. Defendant, of course, had the right to discharge plaintiff in the event of inadequate job performance or for failure to follow orders at a presentation to a client.(16) However, the evidence abundantly establishes that the purported justification for defendant's discharge -- plaintiff's alleged behavior at the February 1973 presentation -- was sheer pretext advanced for the first time at the trial, more than two years after

(16) See Gillin v. Federal Paper Board Co., 479 F.2d 97, 101 (2d Cir. 1973); Bradington v. IBM Corp., 360 F. Supp. 845, 853-55 (D. Md. 1973), aff'd without opinion, 492 F.2d 1230 (4th Cir. 1974); McFadden v. Baltimore S.S. Trade Assoc., 352 F. Supp. 403, 411-12 (D. Md. 1973), aff'd, 483 F.2d 452 (4th Cir. 1973); Barnes v. Lerner Shops of Texas, Inc., 323 F. Supp. 617, 622 (S.D. Tex. 1971).

the event.(17)

After plaintiff made her demand for pay parity early in December 1972, she continued to service the Upjohn account. Her qualifications and expertise to perform her functions are not in dispute. In February 1973, together with Lilker, her superior in charge of the account, plaintiff participated in presenting before a group of Upjohn executives a

(17) Even if defendant was in part motivated by this incident, the court's finding that its decision was also motivated by unlawful factors makes the suspension illegal. See NLRB v. George J. Roberts & Sons, Inc., 451 F.2d 941, 945 (2d Cir. 1971); Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970); NLRB v. Gladding Keystone Corp., 435 F.2d 129, 131-32 (2d Cir. 1970); NLRB v. Milco Inc., 388 F.2d 133, 138 (2d Cir. 1968); NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 728 (2d Cir. 1965); NLRB v. Great Eastern Color Lithographic Corp., 309 F.2d 352, 355 (2d Cir. 1962), cert. denied, 373 U.S. 950 (1963); NLRB v. Jamestown Sterling Corp., 211 F.2d 725, 726 (2d Cir. 1954).

proposed advertising and marketing campaign for one of Upjohn's products. The defendant asserts that she interfered with the presentation by interrupting and improperly criticizing Lilker in the presence of the Upjohn representatives; that since the presentation is the end product of the combined effort of defendant's staff and intended to gain the client's acceptance of the program, a united front is required; and that plaintiff's behavior was detrimental to defendant's interest and "could if left to continue seriously affect [its] relationship with Upjohn."

Despite this charge of unseemly conduct at the preliminary February presentation, defendant required that plaintiff participate in the second and final presentation which took place in early March. It is conceded that on this occasion no untoward incident occurred and that the

presentation was made in a competent manner. If, as defendant now asserts, plaintiff's alleged obstructive conduct at the February meeting was the reason for her suspension, one is moved to inquire why action had not been taken at that time and why plaintiff was called upon to continue her duties in March at the second presentation.

Significantly, the March 13, 1973 NYCCHR fact finding conference took place soon after the March presentation. Yet no mention was made of the February presentation. Other facts indicate beyond peradventure that defendant's reliance on the February presentation is sheer afterthought. Kallir's letter of March 26th relieving plaintiff of her duties makes no mention of the February presentation, nor does his memorandum of March 27th to the staff of the agency. Neither Kallir nor Lilker ever talked to plaintiff about her conduct at that presen-

tation. Immediately after plaintiff's suspension with pay, a representative of the NYCCHR asked Kallir about his action; yet he never mentioned the February presentation.

And of even greater significance is the fact that Lilker, the senior KPR official at the February presentation whom plaintiff allegedly interrupted and criticized, did not testify. As the individual allegedly involved in the incident and an executive officer of responsibility, one would have expected to hear his version of what, if anything, transpired. The failure of the defendant to present his testimony permits the inference that his testimony would not have supported the defendant's eleventh hour attempt to present a good faith business justification for its action.(18)

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(18) Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939); (contd)

The objective facts require rejection of defendant's contention that one of the reasons for suspending plaintiff was her conduct at the February preliminary presentation;

(18 contd) Local I.B.T. v. United States, 291 U.S. 293, 297 (1934); Bass v. Hutchins, 417 F.2d 692, 698 (5th Cir. 1969); San Antonio v. Timko, 368 F.2d 983, 985 (2d Cir. 1966); N. Sims Organ & Co. v. SEC, 293 F.2d 78, 80-81 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944); SEC v. Kalley, Andrews & Bradley, Inc., 341 F. Supp. 1201, 1205 (S.D.N.Y. 1972); Wigmore, Evidence § 289 (3d ed. 1940); McCormick, Evidence § 249 (1954). See also United States v. Blakemore, 489 F.2d 193, 195 (6th Cir. 1973); United States v. Noah, 475 F.2d 688, 691 (9th Cir.), cert. denied, 414 U.S. 821 (1973); United States v. Evanchik, 413 F.2d 950, 953 (2d Cir. 1969); United States v. Dibruzzi, 393 F.2d 642, 646 (2d Cir. 1968); United States v. Llamas, 280 F.2d 392, 393-94 (2d Cir. 1960); United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946); United States v. Dolinger, 384 F. Supp. 682, 687 (S.D.N.Y. 1974); United States v. Kulp, 365 F. Supp. 747, 766 (E.D. Pa. 1973); United States v. Pawlak, 352 F. Supp. 794, 798 (S.D.N.Y. 1972).

they compel the conclusion that the real reason for her suspension and subsequent discharge was in reprisal because she had filed the sex discrimination charge and engaged in activity protected by the Act. The court finds that defendant's acts were in violation of section 704(a) of Title VII and that plaintiff and the EEOC are entitled to judgment, which shall include back pay to plaintiff,[19] reduced by the amount she earned or reasonably could have earned in other employment since her discharge.[20] The award shall also include bonuses, profit

(19) Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4885 (U.S. June 25, 1975): "[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."

(20) See § 706g, 42 U.S.C. § 2000e-5(g).

sharing and other benefits to which plaintiff would have been entitled had she been continued in her employment. Consistent with the statutory policy of encouraging individuals to protect Title VII rights, plaintiff's counsel will be allowed reasonable attorney's fees upon proper application to the court.[21]

(21) § 706(k), 42 U.S.C. § 2000c-5(k). Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4883 (U.S. June 25, 1975); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), cert. denied, 414 U.S. 854 (1973); United States v. Georgia Power Co., 474 F.2d 906, 927 (5th Cir. 1973); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1008 (9th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348, 360 n.26 (5th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1383 (4th Cir.), cert. denied, 409 U.S. 982 (1972). See Northcross v. Board of Educ., 412 U.S. 427 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, 74 Civ. 3234

and

JOSEPHINE McGEE, 75 Civ. 401

Plaintiff-Intervenor, OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

-against-

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant.
- - - - - - - - - - - - - - - - - - - X

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This Court, after a trial upon the merits, rendered a decision on July 31, 1975 finding that defendant violated section 704 of the Civil Rights Act of 1964,[1] in that its discharge of plaintiff was in retaliation for her filing a charge of discrimination against defendant, and that plaintiff was entitled to an appropriate judgment.[2] The attorneys for the respective parties were unable to agree on the form of the judgment. Thereupon, on September 30, 1975, this Court ordered a forthwith hearing before the late Magis-

(1) 42 U.S.C. § 2000e-3(a) (as amended). Subsequent citations will be to the United States Code.

(2) EEOC v. Kallir, Philips, Ross, Inc., 401 F.Supp. 66 (S.D.N.Y. 1975). Although the suit was brought by the EEOC, see 42 U.S.C. § 2000e-5(f), in this opinion, "plaintiff" will refer to plaintiff-intervenor Josephine McGee. Familiarity is assumed with the facts set forth in the Court's prior opinion.

trate Hartenstine[3] to compute the amount of back pay to which plaintiff was entitled, reduced by the amount that she reasonably could have earned since her discharge. At that time the Court observed that it defied understanding why the lawyers "have not been able to sit down and compute these figures yourselves."[4]

Unfortunately the Court's purpose to obtain an expeditious disposition has not been realized. The post-trial proceedings have been marked by unusual delay, much of it due to obstructive and dilatory conduct by defense counsel and unseemly conduct engaged in by both plaintiff and defense counsel at the hearings before the Magistrate.[5] The testimony on the issues re-

(3) See 28 U.S.C. § 636(b); Rule 35(a), S.D.N.Y. General Rules.

(4) Transcript of Hearing, Sept. 30, 1975 at 2.

(5) See, e.g., Transcript of Magistrate's Hearing, at 201-04, 215, 338-39, 431-32, 471, 477.

ferred to the Magistrate extended over a three-day period, on February 17, 25 and 26, 1976; the transcript exceeds that of the trial record. Much of this is accounted for by petty bickering between counsel and evidential objections that at times bordered on the captious. Further delay was occasioned by submission of proposed findings to the Magistrate.

Magistrate Hartenstine died in July 1976 while the matter was sub judice before him. In an attempt to conclude the matter, this Court, on July 30, 1976, referred the proceedings to Magistrate Schreiber to review the record and to report, which he did on August 31, 1976. The parties were invited to express their views upon the Magistrate's recommendations, and following receipt of their comments and objections, the Court heard the parties in support of their respective positions. The defendant, in opposing the

recommendations, requests that since Magistrate Schreiber did not hear or observe the witnesses, the matter again be referred to a Magistrate for a de novo hearing and report on the very issues that were the subject of the reference to Magistrate Hartenstine.

It is now more than fourteen months since this Court rendered its decision that defendant's discharge was retaliatory and unlawful. Plaintiff was discharged on May 15, 1973, more than three years ago. Another reference will serve no purpose except to gain more time for defendant and to delay the judgment day. The original reference was made by this Court out of an abundance of fairness to defendant, since it was evident that upon the trial defendant had failed to counter plaintiff's testimony that despite her best efforts following her discharge all she earned was no more than $1400. There

was enough before the Court to have permitted a finding at that time on the award of damages. The reference afforded the defendant a second opportunity to present proof on the issue. There is no need for another reference or additional testimony. The defendant had a full opportunity at the post-trial hearing to examine and cross-examine witnesses and to offer all its proof to negate plaintiff's claim for damages; the record shows it did so. It is time to call a halt to the dilatory tactics of defendant and to award plaintiff the judgment to which she is entitled under the Court's decision.

In passing upon a Magistrate's report the Court is required to review the entire record and come to its own determination on the merits of the matter, to avoid an abdication of judicial responsibility.[6]

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(6) See Campbell v. United States District Court, 501 F.2d 196, 205-07 (9th Cir.), (contd)

The Court has read and studied this record word for word. In addition, the Court had the benefit of demeanor testimony on this as well as other issues during the original trial of this matter. The Court will therefore determine the outstanding issues upon the trial record and the record before Magistrate Hartenstine, and makes the following additional findings of fact and conclusions of law.

GROSS AMOUNT OF BACK PAY

Plaintiff is entitled to be made whole for the losses she sustained as a result of her wrongful discharge[7]. This includes back pay from the date of

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(6 contd) cert. denied, 419 U.S. 879 (1974); cf. Mathews v. Weber, 423 U.S. 261, 269-75 (1976). Compare Rule 53(b), (e)(2), Fed. R. Civ. P.

(7) Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); EEOC v. Steamfitters Local 638, Dkt. Nos. 75-6132, -6140, -7646, -7668, -7699, -7011 (2d Cir. Sept. 7, 1976), slip op. at 5447.

discharge to the present, including such increases, if any, as she would have received within that period.(8) The defendant contends that salary increases were granted by its Executive Committee on an individual basis, depending in each instance upon an evaluation of the employee's performance, and that plaintiff's performance had so deteriorated that she would not have been granted any increase. Accordingly, defendant argues that it would be

(8) Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3254 (U.S. Oct. 7, 1975) (No. 75-536); see also Golay & Co. v. NLRB, 447 F.2d 290, 294-95 (7th Cir. 1971), cert. denied, 404 U.S. 1058 (1972). The Supreme Court has stated that the back pay provision of Title VII was "expressly modeled on the back-pay provision of the National Labor Relations Act" and has looked to cases arising under that act to interpret the scope of back pay in Title VII cases. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 & n.11 (1975).

highly speculative to award any salary increase to plaintiff. The short answer is that where one's conduct has prevented a precise computation of damages, the injured party is not to be deprived of adequate damages. The trier of the fact may draw reasonable inferences from relevant facts, and all doubts are to be resolved in favor of the injured party; the wrongdoer does not become the beneficiary of his own wrongful conduct.(9) First, this Court has already rejected defendant's contention that McGee's job per-

(9) Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-63 (1931); EEOC v. Steamfitters Local 638, supra n. 7, slip op. at 5439-40; Day v. Mathews, 530 F.2d 1083, 1086 (D.C. Cir. 1976); Kaplan v. Theatrical Employees Local 659, 525 F.2d 1354, 1362-63 (9th Cir. 1975); Hairston v. McLean Trucking Co., 520 F.2d 226, 232-33 (4th Cir. 1975); Meadows v. Ford Motor Co., 510 F.2d 939, 941-48 (6th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379-80 (5th Cir. 1974).

formance was the cause of her discharge; second, it is a fact that plaintiff received periodic increases; third, plaintiff's co-workers, engaged in similar activities, have received increases within the period here under consideration.

Plaintiff's job performance with defendant during her entire service earned her repeated advances in position and salary. She started in 1967 as an administrative assistant to an account executive at a salary of $8,000 per year. The next year she was promoted to account executive at $9,000 a year; thereafter she received yearly raises to $10,000, $12,500, and $15,000, and finally to $18,000, when she was notified of her discharge on May 15, 1973. She was promoted to account administrator, account executive and senior account executive. While her rise was meteoric, it would be unrealistic to assume she would have continued to receive

the large annual raises she received up to the time of her discharge; so, too, it would be unrealistic to assume that she would not have received some increase. The grant of an increase in wages or salary is a normal incident of the way of life in the industrial and commercial world. The evidence warrants a finding that except for defendant's unlawful discharge of plaintiff, she would have, in the normal course of her continued employment with the defendant, received periodic salary increases.

In an effort to reach a fair evaluation of such likely increases, the Court has reviewed the payroll records of defendants' employees within the job category of "account executive" during the years 1973, 1974 and 1975. Each such employee was granted an increase in annual salary in each of those years. While the amount of the individual increases varied, all

fell within a range of from seven to twenty per cent. However, plaintiff's basic salary varied substantially from those of some account executives, so that no precise yardstick for comparison purposes may be applied. In view of plaintiff's rapid rise, as the dollar amount of her salary increased, it is probable that the percentage rate of increase would level off. Thus for the first year after discharge, the Court deems an increase of ten per cent appropriate; thereafter, seven and a half per cent. Accordingly, the Court computes the gross amount of back pay to which plaintiff is entitled as follows:

Salary from May 1 to December 1, 1973, at $18,000 per year (10)	$12,000.00
Salary for 1974	19,800.00
Salary for 1975	21,285.00

(10) The parties stipulated that plaintiff was last paid on April 30, 1973.

Salary from January 1 to September 30, 1976, at $22,881.38 per year	$17,161.04
Total back salary	$70,246.04

In addition to salary, the plaintiff is entitled to receive as part of her back pay award any fringe benefits she would have received had she remained employed by defendant.(11) Defendant has already paid to plaintiff her interest in defendant's profit-sharing and pension plans as of the time of her discharge. Further, plaintiff spent $613.14 after her discharge to replace Blue Cross/Blue Shield coverage which defendant had formerly provided, and incurred medical expenses (not covered by her health insurance) of which $1,837.92 would have been reimbursable under defendant's major medical policy. Plaintiff is thus entitled to a total of $2,451.06 in addition to her salary, making a total gross back pay award of $72,697.10.

(11) Satty v. Nashville Gas Co., 522 (contd)

DEDUCTIONS FROM BACK PAY

Once the gross amount of back pay owed plaintiff has been determined, the burden shifts to the defendant to prove what should be deducted therefrom as "[i]nterim earnings or amounts earnable with reasonable diligence."(12) The parties stipulated that plaintiff earned $1,400 as a typist

(11 contd) F.2d 850, 855 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3254 (U.S. Oct. 7, 1975) (No. 75-536); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974); Bowe v. Colgate Palmolive Co., 489 F.2d 896, 903 (7th Cir. 1973).

(12) 42 U.S.C. § 2000e-5(g); see Kaplan v. Theatrical Employees Local 659, 525 F. 2d 1354, 1363 (9th Cir. 1975); Sprogis v. United Air Lines, Inc., 517 F.2d 387, 392 (7th Cir. 1975); Inda v. United Air Lines, Inc., 405 F. Supp. 426, 434 (N.D. Cal. 1975). This is the rule in cases under the National Labor Relations Act, see n. 8 supra. NLRB v. Nickey Chevrolet Sales, Inc., 493 F.2d 103, 107-08 (7th Cir.), cert. denied, 419 U.S. 834 (1974); NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1318 (D.C. Cir. 1972); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569,

in 1974 and 1975. The sum of $5,385 received by plaintiff as unemployment compensation since her discharge should further be deducted from the amount owed her,(13) which, together with the aforementioned interim earnings, requires a total deduction of $6,785, leaving a net sum of $65,912.10.

Defendant claims that it has shown that a further deduction should be made from plaintiff's back pay award for amounts earnable with reasonable diligence. Its position is that the failure of plaintiff

(12 contd) 575 (5th Cir. 1966); NLRB v. Mastro Plastics Corp., 354 F.2d 170, 178-79 (2d Cir. 1965); NLRB v. Brown & Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963).

(13) EEOC v. Steamfitters Local 638, supra n. 7, slip op. at 5448-50; Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3254 (U.S. Oct. 7, 1975) (No. 75-536); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969).

to use all available means of pursuing employment opportunities establishes lack of due diligence in seeking employment. However, defendant's burden of proving a lack of diligence is not satisfied merely by a showing that there were further actions that plaintiff could have taken in pursuit of employment. Rather, defendant must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment. The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct.(14)

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(14) See Williams v. Albemarle City Board of Educ., 508 F.2d 1242, 1243 (4th Cir. 1974) (en banc); Inda v. United Air Lines, Inc., 405 F.Supp. 426, 435 (N.D. Cal. 1975); Lowry v. Whitaker Cable Corp., 348 F. Supp. 202, 218 (W.D. Mo. 1972), aff'd, 472 F.2d 1210 (8th Cir. 1973). Cf. Ellerman Lines, Ltd. v. The President Harding, 288

Plaintiff's skills come within the fairly limited or specialized field of

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(14 contd) 290 (2d Cir. 1961):

> It is not fatal to recovery that one course of action, reasonably open but not followed, would have avoided further injury whereas another, also reasonable and taken, produced it. . . . The standard of what reason requires of the injured party is lower than in other branches of the law. . . . [Plaintiff] ought not be deprived of recovery if its conduct came within the range of reason, even if the full light of reason was not, in fact, brought to bear.

The conduct which will bar recovery of back pay under the National Labor Relations Act, see n. 8 supra, has been characterized as "a clearly unjustifiable refusal to take desirable new employment" or "a willful loss of earnings." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 199-200 (1941); NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2d Cir. 1965). See also Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 148-49 (2d Cir. 1968); NLRB v. Arduini Mfg. Corp., 394 F.2d 420, 423 (1st Cir. 1968); NLRB v. Cashman Auto Co., 223 F.2d 832, 836 (1st Cir. 1955).

pharmaceutical advertising. Her only training was in this field. Prior to September 1975, plaintiff sought work both within her area of competence and without it. In that period she contacted, or attempted to contact, seven advertising agencies, ten firms in related areas (such as trade publications or companies which organized audio-visual medical seminars), and eight employment agencies. She also applied for work with two government agencies. She did not apply to every advertising agency in her field, nor did she make extensive use of classified advertisements or employment agencies which specialize in placing advertising executives. Instead, she relied upon her personal contacts within advertising agencies and upon informal means such as personal references and attendance at trade association meetings, in an effort to find job openings for which

she might be suited. As previously noted, her efforts were unsuccessful except that she was referred to some part-time secretarial work by one of the employment agencies.

The evidence in the case does not support defendant's contention that plaintiff failed to use reasonable means of seeking employment. Defendant has not shown that plaintiff was not active in her efforts; rather, it is clear that plaintiff attempted to obtain alternate employment. The specialized nature of pharmaceutical advertising and promotion necessarily limited the available opportunities, and word of mouth contact was an effective means of seeking job opportunities. The testimony of defendant's own expert witness, the personnel director of the largest pharmaceutical advertising agency,[15] lends substantial

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[15] Plaintiff applied to this firm for

support to plaintiff's contention that her actions were reasonably diligent. He testified that his usual practice in finding qualified persons for vacancies at his firm is to examine his personal file of contacts made over the years and to inquire about potentially available executives from his own employees and from persons he knows in other agencies. Thus he relies primarily on the very means used by plaintiff in her efforts to seek employment -- word of mouth and personal contacts. Plaintiff's use of the same method as that employed by an experienced personnel director was not unreasonable. Upon careful examination of the entire record, the Court finds that the defendant has failed to sustain its burden of showing that the plaintiff did not dili-

(15 contd) employment but her application was rejected in favor of another applicant whom the witness felt was better qualified for the position.

gently seek employment in the period following her discharge and prior to september 1975.

However, plaintiff made no effort to secure employment after September 1975 because she expected to be reinstated immediately following this Court's earlier opinion.(16) Defendant claims that plaintiff is entitled to no back pay after that time. However, Title VII requires that a back pay award be reduced only by "amounts earnable with reasonable diligence." To sustain its burden of establishing such deductions, the defendant must show not

(16) Although defendant claims plaintiff stopped looking for work in December 1974, she made at least two further efforts through employment agencies. Moreover, the job market for advertising executives was generally bad throughout most of 1975, and so defendant has not shown that any jobs were available for plaintiff at any time during the year.

only that plaintiff failed to exercise due diligence in seeking employment, but also that had she been diligent she might have found employment and had some earnings.(17) By the testimony of defendant's own witnesses, however, the job market for advertising executives "stunk terrible" in 1975. Defendant has not shown that any jobs were available to plaintiff at the time she stopped looking for work, and has thus failed to sustain its burden of showing any "amounts earnable with reasonable diligence" after plaintiff was discharged. Plaintiff is thus entitled to a net back pay award of $65,912.10.

REINSTATEMENT

Reinstatement is a troubling aspect

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(17) See Sparks v. Griffin, 460 F.2d 433, 443 (5th Cir. 1972); Hegler v. Board of Educ., 447 F.2d 1078, 1081 (8th Cir. 1971); cf. Inda v. United Air Lines, Inc., 405 F. Supp. 426, 435 (N.D. Cal. 1975).

of this case, already beset by a number of difficult problems. Like the other remedies available under Title VII, reinstatement is not mandatory upon a finding that an employee has been discriminatorily discharged, but is an equitable remedy whose appropriateness depends upon the discretion of the court in the light of the facts of each individual case.(18) However, since the purpose of reinstatement is to make the plaintiff whole for the injury she has suffered, it, like back pay, should be denied

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(18) 42 U.S.C. § 2000e-5(g) ("the court may . . . order such affirmative action as may be appropriate") (emphasis supplied); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 268 (10th Cir. 1975); Brito v. Zia Co., 478 F.2d 1200, 1204 (10th Cir. 1973); see Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-16 (1975). See also NLRB v. Commonwealth Foods, Inc. (West End), 506 F.2d 1065 (4th Cir. 1974); NLRB v. King Louie Bowling Corp., 472 F.2d 1192 (8th Cir. 1973); see n. 8 supra.

> only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.(19)

This litigation has been marked by more than the usual hostility between the parties. Some antagonism is the natural result of the filing and litigation of discrimination and retaliation charges and to deny reinstatement merely because of the existence of hostility might be contrary to the remedial goals of Title VII.(20) However, in this case the job from which plaintiff was discharged required a close working relationship between plaintiff and

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(19) Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); see also Franks v. Bowman Transp. Co., 96 S. Ct. 1251, 1267 (1976).

(20) Cf. Burton v. Cascade School Dist., 512 F.2d 850, 855-56 (9th Cir.), cert. denied, 423 U.S. 839 (1975) (Lumbard, J., dissenting).

top executives of defendant. It also involved frequent personal contact with defendant's clients, with plaintiff acting as defendant's representative. Lack of complete trust and confidence between plaintiff and defendant could lead to misunderstandings, misrepresentations and mistakes, and could seriously damage defendant's relationship with its clients. The situation here is quite unlike that presented when reinstatement is sought for an assembly line or clerical worker, or even for an executive whose job is not as sensitive for his employer's interests as is plaintiff's job here. The Court is convinced that after three and a half years of bitter litigation the necessary trust and confidence can never exist between plaintiff and defendant. To order reinstatement on the facts of this case would merely be to sow the seeds of future litigation, and

would unduly burden the defendant. Thus, reinstatement will not be ordered in this case.(21) However, it would be unjust to plaintiff to deny her reinstatement without giving her a reasonable opportunity to find other employment. The Court is of the view that in the current market and economic climate in the pharmaceutical advertising industry, by the exercise of diligent effort plaintiff should be able to secure employment at a salary commensurate with her skills within a year. Thus the Court will award an additional one year's salary of $22,881.38.

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(21) See Hyland v. Kenner Prod. Co., 11 CCH Empl. Prac. Dec. ¶ 10,926 at 7912-13 (S.D. Ohio May 5, 1976); cf. Burton v. Cascade School Dist., 512 F.2d 850, 852-54 (9th Cir.), cert. denied, 423 U.S. 839 (1975); Held v. Missouri Pacific R.R., 373 F. Supp. 996, 1004 (S.D. Tex. 1974).

CONCLUSION

The plaintiff is entitled to judgment in the amount of $88,793.48, plus six per cent interest payable quarterly.

Judgment may be entered accordingly.

Dated: New York, N. Y.
October 8, 1976

EDWARD WEINFELD
United States District Judge